

1 case, which no jury instruction could cure. In an effort to avoid prejudice, Defendant PSS urges
2 its motion in limine based on this memorandum.

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4 **Evidence/testimony regarding alleged acts of discrimination must be excluded.**

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6 Defendant CNMI Public School System anticipates that Plaintiff will seek to introduce
7 evidence at trial regarding acts of alleged discrimination, mistreatment and/or favoritism of
8 employees at Hopwood Junior High School by Defendant Jim Brewer. Such evidence is not
9 relevant to Plaintiff's case and any probative value that such evidence may have is outweighed
10 by its prejudicial nature. This evidence must be excluded pursuant to Fed.R.Evid. 403. In
11 addition, evidence of other acts for the purpose of proving a person acted similarly on other
12 occasions must be excluded pursuant to Fed.R.Evid. 404(b).

13 In this case, the admission of any off-hand or even insensitive comments by Defendant
14 Brewer and/or newspaper articles regarding alleged discrimination by Brewer at Hopwood
15 Junior High School are more prejudicial than probative. Plaintiff may attempt to introduce
16 comments made by Brewer referring to "little manilla" and a joke about Mexicans. The
17 admission of these allegations creates the danger of unfair prejudice. Even in cases of
18 employment discrimination, such offhand comments, teasing, and isolated incidents do not
19 amount to discrimination. See, Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275
20 (U.S. 1998). At any rate, the off-hand comments could not have been directed at plaintiff who is
21 a white female.

22 Such remarks are not relevant and even if marginally relevant, have a greater potential to
23 cause the jury to punish Defendants Brewer and PSS for conduct that has nothing to do with
24 Plaintiff's claims. This court has the authority to exclude such comments. In *Kelly v. Boeing*
25 *Petroleum Services, Inc.* 61 F.3d 350, 356-357 (5th Cir 1995), the Court excluded testimony
26 concerning a supervisor's (Mr. Lemoine) insensitive actions and unsympathetic attitudes towards
27 other employees who were members of several disadvantaged minority groups. The court found
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1 that these “Bunker-esque” remarks even if relevant had “the substantial potential to confuse and
 2 mislead the jury and is calculated to arouse jury sympathy of the *unfairly* prejudicial genre
 3 causing the jury to attempt to punish BPS (employer) for other acts of Mr. Lemoine . . .”. *Id.* at
 4 356-57.

5 The admission of media articles and/or testimony from witnesses regarding alleged
 6 discrimination at Hopwood are marginally relevant at best. Such evidence and testimony
 7 regarding discrimination at Hopwood is “a textbook example of unfair prejudice”. *See, Bhaya v.*
 8 *Westinghouse Elec. Corp.*, 922 F. 2d, 184, 188 (3rd Cir 1990) citing 10 *Moore's Federal Practice*
 9 § 403.10[1] at IV-75 & n. 9 (1990); E. Cleary (ed.), *McCormick on Evidence* § 185 at 545
 10 (1984); C. Wright & A. Miller, *Federal Practice and Procedure* § 5215 at 281. In *Bhaya*, the
 11 court excluded testimony from a witness regarding management’s comments regarding violating
 12 a collective bargaining agreement. The court held that “such evidence may influence a jury to
 13 return a verdict based on a desire to punish for the other wrongs.” *Bhaya*, 922 F. 2d at 188.
 14 Consequently, the *Bhaya* court upheld the exclusion of the testimony.

15 This is not a discrimination case. The only claims are the intentional infliction of
 16 emotional distress and CNMI due process violation. Yet, Plaintiff through the testimony of some
 17 employees at Hopwood and the admission of newspaper articles regarding alleged discrimination
 18 will attempt to portray Mr. Brewer as a racist who discriminated against employees at HJHS. It
 19 must be noted that the newspaper articles are hearsay and must be excluded pursuant to Fed.
 20 R.Evid.801(d)(2). Clearly, any probative value of testimony regarding alleged discrimination
 21 of off-hand comments and jokes is outweighed by its prejudicial effect.

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 23 **Testimony from Hopwood employees regarding how they were treated by Defendant**
 24 **Brewer and/or PSS is similarly irrelevant and prejudicial.**

25 In *Haskell v. Kaman Corp.*, 743 F.2d 713, 722 (2nd Cir. 1984), the court upheld the
 26 exclusion of six former employees in an age discrimination case regarding the circumstances of
 27 their termination. The court found that probative value of such testimony was so ‘substantially
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1 outweighed by the danger of unfair prejudice’ that it definitely should have been excluded by the
 2 district court in accord with Fed.R.Evid. 403. *Id.* at 722. The Court noted that “even the
 3 strongest jury instructions could not have dulled the impact of a parade of witnesses” that
 4 claimed to have been laid off because of their age. *Id.*; see also, *Cowan v. Prudential Ins. Co. of*
 5 *America*, 141 F.3d 751, 757 (C.A.7 (Ill.) (1998))(evidence of sexual harassment of a co-worker
 6 does not demonstrate sexual harassment of Plaintiff “because only harassment which
 7 subjectively offends the plaintiff is actionable, a plaintiff cannot rely on what another plaintiff
 8 claims to be offensive”).

9 The risk of allowing evidence regarding discrimination and/or prior complaints against
 10 Defendant Brewer will create a mini-trial regarding whether Defendant Brewer engaged in any
 11 discrimination at HJHS. This is exactly what Evidence Rules 403 and 404(b) are designed to
 12 prevent. See, *McWhorter v. City of Birmingham*, 906 F.2d 674, 679 (11th Cir.1990) (exclusion of
 13 testimony regarding other employee grievances was upheld because the admission of such
 14 testimony “could have resulted in a series of mini-trials centering on the employment history of
 15 each officer”). Any evidence regarding discrimination at Hopwood Junior High School and
 16 complaints against irrelevant to this matter and, even if marginally relevant, its prejudicial effect
 17 far outweighs any probative value.

18 Based on the foregoing, Defendant PSS requests that the court issue an order excluding
 19 all references by parties, attorneys and witnesses, including all direct and indirect forms of
 20 communications, including pleadings, questions, testimony, remarks and arguments regarding
 21 the following:

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- 23 1. any comments by Defendants regarding race, ethnicity, or national origin;
- 24 2. any complaints and/or grievances, other than Plaintiff’s grievance, against
- 25 Defendant Brewer, including any Equal Employment Opportunity Commission
- 26 (EEOC) charges;
- 27 3. allegations of discrimination of any kind by Defendants;
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Respectfully submitted this 7th day of February 2007 by:

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